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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 24.03.2005

Coram:

The Honourable Mr.MARKANDEY KATJU, Chief Justice

and

The Honourable Mrs. Justice PRABHA SRIDEVAN

R.C.P. No. 9 of 2004

Commissioner of Central Excise,
Salem. …. Applicant

vs.

M/s.Chemplast Sanmar Ltd.,
Mettur Dam – 3. …. Respondent

Petition under Section 35 H(1) of the Central Excise Act, 1944 praying that in the circumstances stated therein the High Court will be pleased to direct Customs Excise and Gold [Control] Appellate Tribunal [South Zonal Bench] Chennai to state a case and refer the following question of law.

" Whether MODVAT credit could be allowed at a later date without following any procedures as prescribed under chapter V[AA] of the erstwhile Central Excise Rules 1944 "

against the final order No.74-77 of 2003 dated 24.2.2003 in Appeal No.E/2165/1998 & E 2791 to 2793/1998 in Customs, Excise & Gold [Control] Appellate Tribunal [South Zonal Bench] Shastri Bhavan Annexe, Chennai.

[C.No.V.28/3/19/93VC , dated 23.9.94 on the file of the
Sl. No.64/94

Asst. Collector of Central Excise, Salem Division, Salem -4]

[AS.No.174/94 [CBE] dated 26.10.95 [order in Appeal No.229/95 [CBE] on the file of the Commissioner of Customs & Central Excise [Appeals, Trichy – 1]

For Applicant … Mr.K.Veeraraghavan, SCGSC

For Respondent … Ms.L.Mythili

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O R D E R

THE HONOURABLE THE CHIEF JUSTICE

This is a reference application under Section 35 (H) (1) of the Central Excise Act, 1944 by which the following substantial question of law is sought to be referred for our opinion: -

> " Whether MODVAT credit could be allowed at a later date without following any procedures as prescribed under Chapter V (AA) of the erstwhile Central Excise Rules, 1944."

2. Heard the learned counsel for the parties.

3. The assessee M/s.Chemplast and Plastics India Limited, Mettur Dam is the manufacturer of various inorganic and organic chemicals falling under Chapters 28 & 29 respectively of the schedule to the Central Excise Tariff Act, 1985. The assessee is manufacturing chlorine falling under sub heading No.2801.10 of Schedule to the aforesaid Act, and a portion of the chlorine so manufactured is being removed for the manufacture of Hydrochloric Acid classifiable under sub heading No.2806.10 of the said Act, and exemption in respect of chlorine has been claimed as per Notification No.40/85CE dated 17.03.1985 as amended.

4. A portion of the Hydrochloric Acid so manufactured by the assessee is subsequently used for captive consumption under Nil rate of duty as per Notification No. 217/86CE dated 2.4.86 for the purpose of purification of Brine solution during the initial stage of process of manufacture of Caustic Soda Lye. The exemption granted under Notification No. 40/85CE dated 17.03.85 as amended is available only to the chlorine used in the manufacture of Hydrochloric Acid on which duty of excise used leviable whether in whole or in part. Thus, the chlorine is exempted from duty only on the condition that the hydrochloric acid so manufactured has to suffer duty in full or in part.

5. The stand of the Revenue is that the assessee is availing exemption under Notification No. 217/86CE dated 2.4.86 for Hydrochloric Acid manufactured from chlorine for captive consumption, which is exempt from duty. Hence it is contended that the exemption in respect of chlorine, which is used for captive consumption, is in contravention of the notification No.40/85CE dated 17.3.85 as amended. Hence it is contended by the revenue that the assessee had wrongly availed exemption on chlorine which was used for captive consumption. Hence, the show cause notice was issued to the assessee to show cause as to why the duty on chlorine used by it for captive consumption should not be demanded, and by order dated 23.09.94 the Assistant Collector of Central Excise, Salem Division confirmed the above demand on the reasoning that chlorine and hydrochloric acid are different excisable commodities and either one of them has to suffer duty, and both cannot be cleared free of duty. Against the said order, the assessee filed an appeal before the Commissioner of Central Excise (Appeals), who confirmed the order of

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Assistant Collector of Central Excise. But on further appeal, the CEGAT, Chennai set aside the orders and remanded the matter to the Assistant Commissioner for fresh adjudication relying on its earlier judgment in the assessee's own case reported in 2000 (124) ELT 1103. In that decision, the Tribunal had noted that the assessee was not pressing for the benefit of exemption under Notification No.40/85, but had claimed modvat credit on duty paid on chlorine and for this purpose the matter had to be remanded to the Assistant Commissioner to verify the fact of ultimate payment of duty on chlorine gas and the removal and use of this chlorine gas for the manufacture of Hydrochloric acid captively. The Tribunal had observed that if it was found on verification that the duty paid chlorine gas was used in the manufacture of Hydrochloric acid captively, then without insisting on a prior declaration under Rule 57G and without insisting on the maintenance of RG.23A-Part I & II registers, the modvat credit could be allowed, if otherwise admissible.

6. The contention of the revenue is that the view taken by CEGAT in 2000 (124) ELT 1103 is not correct because for availing modvat credit, the assessee should have followed the procedure prescribed under the Modvat credit rules. It is alleged on behalf of the Revenue that according to the Modvat Rules as existed at the relevant period, credit can be allowed only from the date on which necessary declaration is filed under Rule 57G. In M/s. Paro Food Products v. C.C.E, 1998 (38) ELT 332 and M/s.Poddar Projects Ltd. v. C.C.E, 1989 (43) ELT 595, the CEGAT held that a manufacturer who had not filed a declaration under Rule 57G would not be entitled to take credit of duty paid on inputs received. The filing of declaration is a substantive requirement and not merely a procedural requirement vide M/s.P.G.Conductors v. C.C.E, 1996 (81) ELT 336.

7. On the other hand, it is submitted by the learned counsel for the assessee has not contested the eligibility to Modvat credit on merits, but has only disputed the procedural aspect. The only controversy in the present case is whether Modvat credit can be allowed at a subsequent date when it is found that the duty is payable on an intermediate product, without the procedure having been followed at the material time for availment of Modvat credit on such an intermediate product.

8. Learned counsel for the assessee invited our attention to the decision of the Supreme Court in Formica India Division v. Collector of Central Excise, 1995 (77) ELT 511 (vide paragraph-2), in which the Supreme Court observed: -

> " The circumstances in which the appellants did not pay the duty on the intermediary product before putting the same to captive consumption for producing that stage, the appellants contested the correctness of the classification and had, therefore, not paid the duty on the intermediary product. When it was found that they were liable to pay duty on the intermediary product and had not paid the same, but had paid the duty on the end product, they could not ordinarily have complied

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with the requirements of Rule 56A. Once the Tribunal took the view that they were liable to pay duty on the intermediary product and they would have been entitled to the benefit of the notification had they met with the requirement of Rule 56A, the proper course was to permit them to do so rather than denying to them the benefit on the technical ground that the point of time when they could have done so had elapsed and they could not be permitted to comply with Rule 56A after that stage had passed. We are, therefore, of the opinion that the appellants should be permitted to avail of the benefit of the notification by complying at this stage with Rule 56A to the satisfaction of the Department"

9. Rule 56A relating to set off of duty is a pre-cursor to the Modvat Scheme, both of which are schemes intended to obviate cascading effect of duty paid at various intermediate stages. The ratio of the decision of aforesaid judgment of the Supreme Court applies to the facts of the present case also. In the present case also the eligibility to pay duty on chlorine, an intermediate product, arose only when the matter came up before the Tribunal, and till this time, the assessee had been claiming exemption from payment of duty on chlorine.

10. We agree with the learned counsel for the assessee that it is not open to the Department to deny Modvat credit to the assessee on the technical ground that the procedure prescribed for availment of credit had not been followed at the material time, since as observed by the Supreme Court in Formica India Division's case (supra) at that point of time the assessee was claiming exemption and hence it was not possible for it to have met the procedural requirements for availing Modvat credit.

11. The Tribunal has only remanded the matter for verification and examining the eligibility to Modvat Credit.

12. For the reasons given above, in our opinion, no questions of law arise out of the order of the Tribunal. Hence, the petition is rejected.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. THE COMMISSIONER OF CENTRAL
EXCISE, SALEM.

2. THE CUSTOMS EXCISE AND GOLD
[CONTROL] APPELLATE TRIBUNAL,
[SOUTH ZONAL BENCH]
SHASTRI BHAVAN ANNEXE
CHENNAI-6

3. THE ASSISTANT COLLECTOR
OF CENTRAL EXCISE,
SALEM DIVISION, SALEM - 4

4. THE COLLECTOR OF CENTRAL
EXCISE,
COIMBATORE -18 [APPEAL/REVIEW SECTION]

5. THE COMMISSIONER OF
CUSTOMS & CENTRAL EXCISE [APPEALS]
TRICHY - 1

one cc to Mr.K.Veeraraghavan, SCGSC, SR.No.14271.

One cc to Mr.R.Sashidaran, Advocate SR.No.14360.

RCP.No.9 of 2004

PV [co]

MK

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